Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DON H. PACE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BRUCE R. HEURLIN *
J. MICHAEL VAN ALSBURG
KARP, HEURLIN & WEISS, P.C.
3060 NORTH SWAN ROAD
TUCSON, ARIZONA 85712-1225
(520) 325-4200

Counsel for Petitioner

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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QUESTION PRESENTED

Does the Ninth Circuit have jurisdiction pursuant to 28 U.S.C. § 1291 and the collateral order doctrine for an interlocutory appeal of a motion to dismiss an indictment that violates the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*?

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LOWER COURT OPINIONS

The Opinion of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) is reported at 201 F.3d 1116 (9th Cir. 2000) and is included in Appendix A, at 1a-9a.

The Opinion of the United States District Court for the District of Arizona (District Court) is unreported and is attached as Appendix D, at 20a-26a. Only the Ninth Circuit's Opinion is at issue for this Petition for Writ of Certiorari (Petition). The District Court's Opinion concentrates exclusively on the merits of Don H. Pace's (Pace) arguments. The only issue presented to this Court is the issue of jurisdiction discussed in the Ninth Circuit's Opinion.

STATEMENT OF BASIS FOR JURISDICTION

On February 7, 2000, the Ninth Circuit issued its Opinion dismissing Pace's appeal for lack of jurisdiction. (Appendix A, at 1a -9a) On February 21, 2000, Pace timely filed a Petition for Rehearing; Suggestion for Rehearing *En Banc*. The Ninth Circuit denied the petition on March 22, 2000. (Appendix E, at 27a-28a)

This Petition is timely because it is filed within 90 days of the Ninth Circuit's denial of Pace's Petition for Rehearing; Suggestion for Rehearing *En Banc*. Rule 13, Sup. Ct. R. The Supreme Court has jurisdiction over this Petition pursuant to 28 U.S.C. §§ 1254(1) and 2106.

RELEVANT STATUTORY PROVISIONS

15 U.S.C. § 1012 (McCarran-Ferguson Act)

* * *

(b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . .

* * *

(Appendix F, at 29a-30a)

28 U.S.C. § 1291

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .

28 U.S.C. § 1292

Interlocutory decisions

* * *

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of

Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

* * *

STATEMENT OF THE CASE

A. Introduction

This case falls squarely within that category of cases exemplifying the ever increasing federal interference in what has been and should be a state regulated matter. Since the very formation of the federal government, there has been an ever increasing promulgation of federal criminal laws. This has meant that more and more federal criminal prosecutions have invaded what were historically and appropriately state matters. *See*, Brigid McMenamin and Janet Novack, *The White-Collar Gestapo*, Forbes, Dec. 1, 1997, at 82. This Court has expressed grave concern with the continuing expansion of federal intrusion into state matters. In fact, this Court, for the first time since the 1930's, struck down a federal law as beyond the Commerce Clause's power to regulate. *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). The federal prosecution in this case is an attempt by the government to overstep its bounds by interfering in state insurance matters, in violation of the McCarran-Ferguson Act.

The McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (Appendix F, at 29a-30a) prohibits the federal prosecution of Pace by mandating that state law take precedence over federal law by "inversely preempting" federal law that interferes with state insurance regulation. The McCarran-Ferguson Act limits federal involvement in the state regulation of the business of insurance. This prosecution attempts to make illegal, under the general federal mail fraud statute, acts that are unquestionably legal under the insurance laws of the State of California. Therefore, this prosecution is barred by the McCarran-Ferguson Act.

B. Case Status

Pace and co-defendant Ralph Eidem (Eidem) were indicted on March 19, 1997. The government obtained a Superseding Indictment on April 16, 1997, alleging 81 counts. On May 20, 1997, the District Court designated the case complex. After several continuances, the pretrial motions deadline was set for June 3, 1998. On that date, Pace filed ten motions. This Petition involves one of those motions - the Joint Motion to Dismiss Counts 1 to 76 Pursuant to 15 U.S.C. § 1012 (The McCarran-Ferguson Act), hereinafter the "McCarran-Ferguson Act Motion to Dismiss."

Oral argument on some of the pretrial motions was held over two days, on July 29 and 30, 1998. Although a number of motions were filed, the McCarran-Ferguson Act Motion to Dismiss was the focal point of oral argument and was a recurring issue during both days of oral argument.

On November 25, 1998, almost four months after oral argument, the District Court filed an order denying the McCarran-Ferguson Act Motion to Dismiss. (Appendix D, at 26a.) Pace timely filed a Notice of Appeal on December 3,

1998.[1] The District Court, in denying a government motion requesting the Court to retain jurisdiction and find Pace's appeal frivolous, "certified"[2] Pace's appeal, holding that:

> [the District Court] is of the opinion that its Order of November 24, 1998, denying Defendants' [McCarran-Ferguson Act Motion to Dismiss] involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation, and thus, is appropriate pursuant to 28 U.S.C. § 1292(b).

December 23, 1998, District Court Order at 4. (Appendix C, at 18a.)

On December 29, 1998, the District Court issued another Order reiterating this certification, verbatim. (Appendix B, at 11a.)

The Ninth Circuit heard oral argument in this appeal on December 7, 1999. On February 7, 2000, the Ninth Circuit issued its decision dismissing Pace's appeal, reasoning

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[1] Co-defendant Eidem, relying on the "law of the case" doctrine, did not notice appeal.

[2] Although 28 U.S.C. § 1292(b) certification only applies to civil cases, the District Court's "certification" emphasizes that the District Court specifically requested guidance from the Ninth Circuit, to no avail.

that it lacked jurisdiction. (Appendix A, at 8a-9a.) Pace files this Petition requesting that the Court review the Ninth Circuit's dismissal of Pace's appeal for lack of jurisdiction. Pace requests that this Court remand the case to the Ninth Circuit for a decision on the merits.

The District Court has set a tentative jury trial date of October 31, 2000.

C. Factual Background

Pace has been an Ohio attorney since 1964, representing both small and large corporate clients on issues of corporate and labor litigation. In 1987 and 1988, Pace principally worked as a consultant, assisting businesses on mergers, acquisitions, and in creating business plans. During this period, Pace also developed and pursued his own business plan to form an insurance holding company that would then acquire a small surety bond and insurance company.

All of the charges against Pace stem from his development of and ownership in an insurance holding company, Pace American Group (PAG), and one of its wholly-owned subsidiaries, American Bonding Company (ABC). Pace has never been an insurance agent.

Eidem's California-licensed business, Commercial Surety Bond Agency (CSBA), was and is located in California. CSBA wrote bonds for California contractors who needed bonds to complete projects in California. Eidem is an insurance agent.

In 1989, CSBA contracted with ABC to write bonds for ABC in return for payment of commissions. CSBA

became one of ABC's largest volume insurance agencies. CSBA also received a separate 5% commission (override) for procuring the services of other insurance agencies in California that brought their business to ABC. The override was paid from March, 1990, through the beginning of 1994. It is not disputed that the payment of the 5% override was paid by ABC to CSBA openly and with the full knowledge of the Boards of Directors of ABC and PAG. It is also not disputed that payment of the 5% override was legal under state and federal law.

The Superseding Indictment alleges that, after receiving payment, Eidem shared the 5% commission with Pace from March, 1990, to November, 1993. The Superseding Indictment further alleges that this sharing of commissions constituted a "scheme to defraud" ABC and PAG. Specifically, the Superseding Indictment alleges that there was a "commission splitting arrangement" between Pace and Eidem and that commission splitting is illegal under Arizona Statutory Insurance Law.[3]

The first 76 counts of the Superseding Indictment are based on this "commission splitting scheme." Counts 1 to 43 allege that this "scheme" was mail fraud under 18 U.S.C. § 1341 and conspiracy to commit mail fraud under 18 U.S.C. § 371. Counts 44 to 76 allege that Pace committed money laundering by depositing the funds derived from the alleged mail fraud into his bank account in Ohio. The money

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[3] The Superseding Indictment fails to address the fact that the commission "splitting" was done in California, CSBA and CSBA's clients were located in California, and Eidem was a California insurance agent. Contrary to Arizona law, California law specifically permits commission "splitting."

laundering Counts are predicated on the allegation that the funds involved in the financial transactions (deposits) were unlawfully derived from the alleged mail fraud.

The Superseding Indictment's allegations of commission splitting is significant because commission splitting is legal under California Insurance Law. Because Pace's alleged actions were legal under state insurance law and the federal government is prosecuting Pace for this activity, prosecution of Counts 1 to 76 of the Superseding Indictment violates the McCarran-Ferguson Act.[4]

D. Basis for Jurisdiction in Lower Courts

The District Court has jurisdiction because this is a prosecution by the United States against Pace for alleged violations of federal law. The Superseding Indictment alleges violations of 18 U.S.C. §§ 371, 1341, 1343, 1956, 1957, and 982 and 26 U.S.C. § 7206(1). The District Court has subject matter pursuant to 18 U.S.C. § 3231.

The Ninth Circuit has jurisdiction over this timely interlocutory appeal pursuant to 28 U.S.C. § 1291 and the collateral order doctrine. *See*, *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). However, the Ninth Circuit erroneously dismissed the appeal for lack of jurisdiction. This Petition is based entirely on the issue of federal appellate jurisdiction over an interlocutory appeal

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[4] Counts 77 to 81 of the Superseding Indictment are based on an allegation of a scheme to defraud that is totally separate from the mail fraud and money laundering counts at issue in this Petition.

involving a complex, novel area of law. The jurisdictional issue is the subject of this Petition and will be discussed in detail in the following "Argument" section.

ARGUMENT

A. Introduction

The appeal involves two separate issues. The first issue involves the question of whether the Ninth Circuit has jurisdiction over Pace's appeal of the denial by the District Court of the McCarran-Ferguson Act Motion to Dismiss. The second issue involves the merits of Pace's appeal and whether the McCarran-Ferguson Act precludes this federal prosecution altogether. Only the first issue is presented in this Petition. Specifically, Pace requests that this Court reverse the Ninth Circuit's dismissal of Pace's appeal for lack of jurisdiction and remand this case to the Ninth Circuit for a decision on the merits.

B. The McCarran-Ferguson Act

Congress passed the McCarran-Ferguson Act in response to an opinion issued by this Court that held that federal criminal anti-trust laws were applicable to the insurance industry. *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). *South-Eastern Underwriters* was a federal criminal prosecution in which the defendants were charged with fixing insurance rates in violation of federal anti-trust laws. This Court held that federal criminal law was applicable to the insurance industry, despite a history of exclusive state regulation. *Id.* Congress passed the

McCarran-Ferguson Act to overturn *South-Eastern Underwriters* and restore the states' exclusive regulatory power over the insurance industry, except as may be specifically noted in a Congressional Act. *See,* H.R. Rep. No. 143, Feb. 1945, *reprinted in* 1945 U.S.C.C.A.N. 670, 671 (Appendix F, at 30a-35a.)

In relevant part, the McCarran-Ferguson Act states:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance. . .

15 U.S.C.S. § 1012(b) (2000).

The McCarran-Ferguson Act "inversely preempts" federal law when federal law interferes with a state's regulation of the insurance industry, unless the federal law explicitly states that it is applicable to the insurance industry.

Prosecution of this case violates the McCarran-Ferguson Act because application of the general federal mail fraud statute will "invalidate, impair, or supersede" a state's law. California law specifically allows commission sharing and rebating in the insurance business. Proposition 103 (passed by California voters in 1988) repealed California's prohibition on commission sharing. Prosecution of this case attempts to make it a federal crime to commit an act that is legal in California. In the field of insurance, unlike other areas where federal law preempts, state law controls where federal law is in conflict, unless Congress has specifically

made the federal law applicable to the business of insurance. Furthermore, it is unquestionable that the McCarran-Ferguson Act applies to federal criminal prosecutions because the McCarran-Ferguson Act was passed to overturn a federal criminal case, *South-Eastern Underwriters*, *supra*.

C. The Ninth Circuit Has Jurisdiction Over This Appeal Pursuant to the Collateral Order Doctrine

Under 28 U.S.C. § 1291, the Ninth Circuit has jurisdiction over "all final decisions of the district courts of the United States . . ." In the criminal context, this has been interpreted to mean appellate review is not available until after a conviction and sentencing. *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798, 109 S.Ct. 1494, 1497, 103 L.Ed.2d 879 (1989). However, there is a judicially created "collateral order exception" to this rule. The collateral order exception was first announced by this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221 (1949), and was applied in the criminal context in *Abney v. United States, supra*. Interlocutory appeal of the District Court's denial of Pace's McCarran-Ferguson Act Motion to Dismiss falls within this exception and is, therefore, interlocutorily appealable.

An order is interlocutorily appealable if it "conclusively determines the disputed question, resolves an important issue completely separate from the merits of the action, and is effectively unreviewable on appeal from the judgment." *Midland Asphalt*, 489 U.S. at 799; 109 S.Ct. at 1498; *United States v. Claiborne*, 727 F.2d 842, 844 (9th Cir.), *cert. denied*, 469 U.S. 829, 105 S.Ct. 113, 83 L.Ed.2d 56 (1984). The Ninth Circuit dismissed Pace's appeal

because, it reasoned, the issues involved are "effectively reviewable on appeal" from the judgment. (Appendix A, at 6a.)

1. Factor One: Order Conclusively Determines Important Legal Issue

The first factor (sometimes considered two separate factors) is that the order appealed from must conclusively determine an important legal issue. *Id.* This factor is clearly met in this case.

First, the order appealed from is conclusive. Pace and Eidem filed a motion to dismiss 76 counts of the Superseding Indictment pursuant to the McCarran-Ferguson Act. A response, replies, and supplements were filed. Lengthy oral argument was heard. In a separate, four page Order filed on November 25, 1998, almost four months later, the District Court denied the motion, stating that acts challenged were not part of the business of insurance. (Appendix D, at 25a.) The District Court's Order clearly and conclusively determined the issue. Nothing further is pending in the District Court that relates to the McCarran-Ferguson Act Motion to Dismiss. Certainly, the McCarran-Ferguson Act issue will not be submitted to the jury for decision.

Second, the issue presented in this appeal is, no doubt, an "important" legal issue. As previously discussed, the McCarran-Ferguson Act Motion to Dismiss involves 76 counts of an 81-count Superseding Indictment. A decision on the merits of this appeal will be a decision on whether or not to go forward with a six- to eight-week jury trial. Furthermore, the District Court's December 23 and 29, 1998, Orders (Appendix B and C) state that the McCarran-Ferguson

Act Motion to Dismiss involves a controlling question of law and an immediate appeal "may materially advance the ultimate termination of this litigation." The District Court's Orders requested an appellate decision on the merits of the McCarran-Ferguson Act Motion to Dismiss. Finally, the merits of this appeal present a unique, significant legal issue that have a major impact on the insurance regulatory laws of California.

2. Factor Two: Issue Appealed From is Completely Separate From the Merits of the Case

The second factor requires that the McCarran-Ferguson Act issue be totally separate from or collateral to the merits of the prosecution itself. In a criminal prosecution, this means that the appealed issue must be "collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i. e.*, whether or not the accused is guilty of the offense charged." *Abney*, 431 U.S. at 659, 97 S.Ct. at 2040.

The District Court's Order denying the McCarran-Ferguson Act Motion to Dismiss in no way involves whether or not Pace is guilty of anything. As previously stated, the McCarran-Ferguson Act issue will not be submitted to the jury for decision. This appeal involves the issue of whether this prosecution violates the McCarran-Ferguson Act. Even if there were a finding that Pace was guilty of the allegations in the Superseding Indictment, Pace is immune from this federal prosecution due to the "inverse preemption" of federal law by state law pursuant to the McCarran-Ferguson Act. Furthermore, the McCarran-Ferguson Act Motion to Dismiss is based on allegations made on the face of the Superseding Indictment.

3. Factor Three: The Issue is Effectively Unreviewable on Appeal From Final Judgment

This factor is the "right not to be tried" element of the collateral order appeal analysis. This factor has been further defined to require that the defendant be "contesting the very authority of the Government to hale him into court to face a trial on the charge against him." *Abney*, 431 U.S. at 659, 97 S.Ct. at 2040. The McCarran-Ferguson Act precisely confers this right to Pace.

The Ninth Circuit's decision concentrated on this element of the collateral order doctrine, finding the McCarran-Ferguson Act issue "reviewable" after trial. However, the Ninth Circuit's Opinion is not strongly reasoned on this point.

In one part of the Ninth Circuit's decision, the Ninth Circuit ignores important language related to this element of the collateral order doctrine. The Ninth Circuit reasons that "Pace's theory for dismissal is reviewable on appeal from a final judgment, if he is convicted." (Appendix A, at 6a.) The Ninth Circuit ignored the "*effectively* unreviewable on appeal from final judgment" language of the collateral order doctrine. Technically, ***any*** issue is reviewable after final judgment, including assertions of double jeopardy and immunity. The issue is whether waiting for review causes harm to, or destroys, the right intended to be protected. In the McCarran-Ferguson Act realm, a state's right as well as the insurance industry's right, to be free from federal interference into state insurance matters is harmed significantly by simply the initiation of a federal prosecution that violates the McCarran-Ferguson Act. The credibility of a state's insurance law is significantly challenged any time a

federal action contrary to that state's law is pending. Furthermore, elimination of the uncertainty that a pending federal action creates is exactly the aim of the McCarran-Ferguson Act. *See,* H.R. Rep. No. 143, Feb. 1945, *reprinted in* 1945 U.S.C.C.A.N. 670, 671 (Appendix F, at 31a). The Ninth Circuit ignored these important purposes of the McCarran-Ferguson Act.

The Ninth Circuit also failed to address the plain language of the McCarran-Ferguson Act. The Ninth Circuit stated "[t]he McCarran-Ferguson Act does not provide an immunity from prosecution, regardless of whether in some circumstances it may provide a bar to conviction." (Appendix A, at 7a.) The Ninth Circuit has relegated the McCarran-Ferguson Act to some sort of a defense. In reality, the McCarran-Ferguson Act is a jurisdictional ***bar*** to any federal action that inadvertently "invalidate[s], impair[s], or supersede[s]" state insurance law.

The Ninth Circuit further reasoned:

> There is no language in the [McCarran-Ferguson Act] providing individuals with immunity from prosecution. The statutory command is that no federal statute "shall be construed" in a particular way.

This narrow view of the McCarran-Ferguson Act is flawed for several reasons. First, the Ninth Circuit ignored the key language of the statute: "No Act of Congress shall be construed to *invalidate, impair, or supersede* any law enacted by any state for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b) (emphasis added). A federal prosecution brought in violation of the McCarran-Ferguson Act clearly ***impairs*** state law as long as the

prosecution is pending. The mere fact that a person is charged and prosecuted violates the McCarran-Ferguson Act because mere prosecution is interference in or "impairment" of state insurance matters. All during the pendency of a prosecution, the state's law is in doubt and any reliance on the state's law is at the risk of the insurance industry agent.

Second, the word "construed," although relied on by the Ninth Circuit, means "to arrange or interpret the words of a . . .statute." Black's Law Dictionary 315 (6th ed. 1990). The word "construe" has no limitation as to ***when*** the interpretation is to occur. A statute can be construed at any time and is not limited to post-conviction interpretation. Frankly, the Ninth Circuit's reliance on this "shall be construed" language is confusing.

Third, and quite significant, the Ninth Circuit completely ignored the clear legislative history behind the McCarran-Ferguson Act. The legislative history of the McCarran-Ferguson Act proves that the McCarran-Ferguson Act creates a "right not to be tried." The McCarran-Ferguson Act overruled an opinion of this Court that upheld a federal criminal anti-trust prosecution of insurance companies, *South-Eastern Underwriters*, *supra.*; *see*, H.R. Rep. No. 143, Feb. 1945, *reprinted in* 1945 U.S.C.C.A.N. 670, 671.

The McCarran-Ferguson Act was passed to stop future interference in state insurance matters by the federal government and avoid confusion as to whether state insurance laws would be valid in the face of conflicting federal law. *Id.* at 671. The House Report, previously cited, states that the McCarran-Ferguson Act should be passed to alleviate the following problem:

> Already many insurance companies have refused, while others have threatened refusal to comply with State tax laws, as well as other State regulations on the ground that to do so, when such laws may subsequently be held unconstitutional in keeping with the precedent-smashing decision in the Southeastern Underwriters case, *will subject insurance executives to both civil and criminal actions for misappropriation of company funds*.
>
> *Id.* (emphasis added) (Appendix F, at 31a)

The McCarran-Ferguson Act was passed, in part, to give insurance executives the peace of mind that they would not be haled into federal court on federal criminal charges on an issue already regulated and permitted by state insurance law. The McCarran-Ferguson Act was passed to bring back the "generally accepted doctrine that the business of insurance was not subject to Federal law." *Id.* This is an immunity-based doctrine. There is no more clear a statement than this for proving that the McCarran-Ferguson Act creates a "right not to be tried."

As with the Double Jeopardy clause of the Sixth Amendment and immunity based doctrines, the McCarran-Ferguson Act was enacted to prevent the Federal government from prosecuting a defendant. Both the McCarran-Ferguson Act and the Double Jeopardy clause prevent a defendant from being haled into court. The two similar rights should have the same remedy – the prevention of a prosecution ***before*** trial. After a trial, the purpose of the McCarran-Ferguson Act has been defeated. By that time, the Federal government already has significantly interfered in state insurance matters.

D. The Ninth Circuit's Reliance on the Eleventh Circuit's *Jordan* Decision in Misplaced

The Eleventh Circuit in *Jordan v. Avco Financial Services*, 117 F.3d 1254 (11th Cir. 1997), held that the Eleventh Circuit did not have jurisdiction over a civil interlocutory appeal involving a McCarran-Ferguson Act argument. The Ninth Circuit stated that "[t]here is no good reason to set up an intercircuit split on the issue," and followed *Jordan*. (Appendix A, at 8a.) Not only is the fear of an "intercircuit split" a poor reason to blindly follow another Circuit's decision, but *Jordan* is not controlling and should not have been followed.

Jordan is a civil case, involving a motion to dismiss filed by defendant insurance companies that were being sued for fraudulently inducing plaintiffs to purchase a form of insurance. *Id.* at 1255. This case is a criminal case, involving the prosecution of a non-insurance agent (Pace) and a California- licensed insurance agent (Eidem) with totally different factual issues than those involved in *Jordan*. Furthermore, the District Court in *Jordan* refused to "certify" the appeal under 28 U.S.C. § 1292(b). *Id.* at 1256. Contrarily, the District Court in this case twice certified Pace's interlocutory appeal. (Appendix B and C.)

Jordan is not a carefully-reasoned decision. The Eleventh Circuit, after listing the three collateral order factors, failed to clearly analyze them. In fact, the *Jordan* court lists the factors, then seems to ignore them, concentrating on whether the McCarran-Ferguson Act is analogous to the interlocutorily appealable immunity issue. *Id.* at 1257. The Eleventh Circuit concentrated on the defendants' specific arguments rather than the broader factor

based analysis. The *Jordan* Court stated "*[h]aving reviewed the cases cited by the parties*, we conclude this court does not have jurisdiction to entertain this appeal." *Jordan*, 117 F.3d at 1255 (emphasis added). After making this statement, the Eleventh Circuit limited its analysis to a discussion of whether the McCarran-Ferguson Act was analogous to immunity. The Eleventh Circuit did not analyze whether the McCarran-Ferguson Act issue, in the criminal context, is analogous to the Double Jeopardy context, as Pace does here.

Jordan's analysis of the immunity issue is flawed. This Court discussed the history of the McCarran-Ferguson Act in *Humana, Inc. v. Forsyth*, 525 U.S. 299, 119 S.Ct. 710, 715-16, 142 L.Ed.2d 753 (1999). This Court's discussion supports an immunity - McCarran-Ferguson Act comparison. In *Humana*, this Court explained that the business of insurance was "immune" from federal regulation prior to its decision in *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). The McCarran-Ferguson Act was designed to overturn this Court's *South-Eastern Underwriters* opinion, returning immunity to the insurance industry.

Furthermore, the *Jordan* Court stated that "[i]t is clear that the [McCarran-Ferguson] Act does not provide immunity to insurance companies against suit in federal court. The plain language of the Act does not mention immunity, nor does it imply that it grants immunity to any person" *Jordan*, 117 F.3d 1257. Although the *plain language* of the McCarran-Ferguson Act does not discuss immunity, the legislative history certainly does. In part, the McCarran-Ferguson Act was passed to return to "the generally accepted doctrine that the business of insurance was not subject to Federal law." H.R. Rep. No. 143, Feb. 1945, *reprinted in* 1945 U.S.C.C.A.N. 670, 671. This is an immunity-based

purpose. The *Jordan* Court made the same mistake that the Ninth Circuit made in Pace's appeal. Both Circuits have improperly ignored the legislative history of the McCarran-Ferguson Act.

In sum, the Ninth Circuit has jurisdiction over this appeal because the McCarran-Ferguson Act creates a type of immunity from suit and a "right not to be tried" parallel to double jeopardy. Had the *Jordan* Court been presented with a federal criminal prosecution and the defendant argued that the McCarran-Ferguson Act was analogous to double jeopardy, the *Jordan* Court may very well have decided differently. Any reliance on the *Jordan* Court's Opinion is misplaced.

E. Other Relevant Authority Supports Jurisdiction Over Interlocutory McCarran-Ferguson Act Based Appeals

Although the collateral order doctrine is intended to be a "narrow" exception to the finality rule of 28 U.S.C. § 1291, there are many cases allowing interlocutory appeal: *Abney*, *supra* (denial of a double jeopardy motion to dismiss is immediately appealable); *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)(denial of qualified immunity is immediately appealable); *Helstoski v. Meanor*, 442 U.S. 500, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979)(denial of motion to dismiss pursuant to Speech and Debate Clause is immediately appealable); *United States v. Claiborne*, 727 F.2d 842, 844 (9th Cir. 1984), *cert. denied*, 469 U.S. 829 (1984), (federal judicial immunity is appealable under the collateral order doctrine); *United States v. Spilotro*, 680 F.2d 612 (9th Cir. 1982)(order restraining business assets is an appealable collateral order); *United States v. Sandoval-Lopez*, 122 F.3d 797 (9th Cir. 1997)(order holding that defendants'

plea agreements had been breached so that trial could go forward is an appealable collateral order); *United States v. Durenberger*, 48 F.3d 1239 (D.C.Cir. 1995)(denial of motion to dismiss based on separation of powers and on statutory basis is appealable as a collateral order). The reasoning in *Helstoski* and *Durenburger* is especially probative here.

In *Helstoski*, this Court held that denial of a motion to dismiss an indictment based on the Speech or Debate Clause of the Constitution is immediately appealable under the *Abney* rationale. The Speech or Debate Clause states "for any Speech or Debate in either House they [the Senators and Representatives] shall not be questioned in any other Place." *Helstoski*, 99 S.Ct. at 2446, n.1, *citing* U.S. Const. Art. I, § 6. This clause, by its plain language, gives the Senate and House of Representatives a kind of exclusive jurisdiction over "liability" for Speech and Debate therein. This thereby creates a right not to be tried, similar to the Double Jeopardy Clause. *Id.* at 2449.

The McCarran-Ferguson Act is analogous to the Speech and Debate Clause. The McCarran-Ferguson Act gives states a kind of exclusive jurisdiction over insurance matters, precluding federal interference. An immunity from federal suit and a right not to be tried is created by the McCarran-Ferguson Act.

In *Durenberger*, 48 F.3d at 1243, the Court of Appeals for the District of Columbia Circuit held that denial of a motion to dismiss pursuant to 2 U.S.C. § 68 was interlocutorily appealable. This statutory provision makes certain payments approved by a Senate Committee conclusive on all "departments and officers" of the government. Durenberger argued that the statute gave "the Senate Rules and Administration Committee exclusive and unreviewable

authority." *Id.* at 1243. It was further argued that the statute was intended to "preserve the independence of Congress." *Id.* The District of Columbia Circuit held that denial of Durenberger's immunity-exclusive-jurisdiction based argument was an appealable collateral order. *Id.*

Similarly, the McCarran-Ferguson Act creates a combination immunity-from-federal-suit/exclusive-jurisdiction type of interest. The McCarran-Ferguson Act creates a guarantee that federal prosecutions shall not interfere with state insurance matters. The McCarran-Ferguson Act not only creates a right not to be tried, but a right not to be haled into federal court when the federal prosecution is contrary to state insurance law. Furthermore, this Court's initial collateral order doctrine case, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221 (1949), also supports McCarran-Ferguson Act interlocutory appealability. *Cohen* states that interlocutory appellate review is "proper in the 'small class' of cases 'which finally determine claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.'" *Id.*

This quote is particularly instructive. Appeal of the denial of a motion to dismiss pursuant to the McCarran-Ferguson Act fits neatly into *Cohen*'s definition of the collateral order doctrine. Pace's claim of immunity under the McCarran-Ferguson Act is totally "separable from, and collateral to" the question of whether Pace is guilty of mail fraud. *Even if Pace were guilty of mail fraud, the McCarran-Ferguson Act prohibits the federal prosecution because it conflicts with state insurance law.* For this same reason, the appeal of a denial of a McCarran-Ferguson Act motion to dismiss is also "independent of the cause itself." The

applicability of the McCarran-Ferguson Act is not a jury question.

F. Practical Considerations Weigh Heavily in Favor of a Finding That Jurisdiction Exists

First, the District Court has specifically "asked " for guidance from the Ninth Circuit on Pace's McCarran-Ferguson Act Motion to Dismiss. Consideration should be given to the District Court's request. Yet, no guidance has been forthcoming from the Ninth Circuit. The importance of the issues in this appeal, as well as the potentially significant impact of an appellate decision on this prosecution, warrant consideration of the merits of this appeal.

Second, the importance of a decision on the merits of this appeal will have a significant impact on this complex case from time savings and economic points of view. The jury trial is expected to take six to eight weeks. If the trial proceeds, Pace, as well as the government, will be forced to spend thousands of dollars and a significant amount of time in preparation for and attendance at the trial. Counsel for Pace is retained, not appointed. Pace has limited financial resources to defend this prosecution. Furthermore, if this Court declines to remand the case for a decision on the merits of the McCarran-Ferguson Act issue at this time, the District Court may be faced with spending the time on a one- to two-month trial that is later held to have been a waste of time.

Third, is the practical consideration of whether granting interlocutory appellate jurisdiction will "open the floodgates" of interlocutory appeals. Of course, this Court always must be concerned about judicial economy, as the District Court, by twice certifying this appeal, is so

concerned. However, addressing the merits of this appeal will not significantly increase the number of interlocutory appeals the Ninth Circuit must address. If interlocutory appeals are limited to the McCarran-Ferguson Act context, and further limited to criminal cases within the McCarran-Ferguson Act context, there will be few, if any, interlocutory appeals.

The McCarran-Ferguson Act was passed in 1945. 15 U.S.C.S. § 1012, notes (2000). Since its passage, 55 years ago, there have been few reported criminal cases involving the McCarran-Ferguson Act. Criminal cases asserting that the defendant has McCarran-Ferguson Act immunity from federal prosecution are extremely rare. Counsel for Pace has found only ***seven*** criminal cases in the past ***55 years*** arguing dismissal under the McCarran-Ferguson Act.[5] The first was in 1951. The other six were from 1994 to 1998, over 43 years after the first reported case. After a 43-year interval, apparently the federal government has decided to intrude on the states' authority under the McCarran-Ferguson Act.

Another factor that must be considered when deciding whether interlocutory criminal appeals in the McCarran-Ferguson Act context will open the "floodgates" of

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[5] *United States v. Pugh*, 151 F.3d 799, 800 (8th Cir. 1998); *United States v. Blumeyer*, 114 F.3d 758, 768 (8th Cir.), *cert. denied*, ___ U.S. ___, 118 S.Ct. 350, 139 L.Ed. 2d 272 (1998); *United States v. Cooper*, 132 F.3d 1400, 1403-04 (11th Cir.), *cert. denied*, ___ U.S. ___, 119 S.Ct. 806, 142 L.Ed. 2d 666 (1998); *United States v. Cavin*, 39 F.3d 1299 (5th Cir. 1994); *United States v. Sylvanus*, 192 F.2d 96 (7th Cir. 1951), *cert. denied*, 342 U.S. 943 (1952); *United States v. Stewart*, 955 F.Supp 385 (E.D. Penn. 1997); *United States v. Schmitzehe*, Crim. A. No. 91-514, 1994 WL 635030 (E.D.La. 1994).

interlocutory appeals is the power of the District Court to certify an appeal as frivolous. In the Double Jeopardy context, the District Court may certify in writing that the interlocutory appeal is frivolous, then continue proceeding with the case. *United States v. LaMere*, 951 F.2d. 1106, 1108-09 (9th Cir. 1991). This same procedure could be used for frivolous interlocutory appeals in the McCarran-Ferguson Act context. This procedure would eliminate frivolous interlocutory appeals, thereby preventing one of the greatest concerns related to interlocutory appeals - improper attempts by a defendant to delay trial by filing a frivolous interlocutory appeal.

In the long run, allowing interlocutory appeals in the McCarran-Ferguson Act context will have a time ***saving*** effect on the judicial system. As illustrated by this case, meritorious interlocutory appeals can prevent a lengthy trial. Reversal by the Ninth Circuit pursuant to the McCarran-Ferguson Act after trial means the time spent at trial was wasted. Although the Ninth Circuit has to take the time to consider an interlocutory appeal, the time savings to the District Court would significantly outweigh the time spent by the Ninth Circuit. The time savings, the few criminal cases involving the McCarran-Ferguson Act, taken in conjunction with the District Court's power to certify an interlocutory appeal as frivolous, weighs greatly in favor of allowing valid interlocutory criminal appeals in criminal cases involving the McCarran-Ferguson Act.

CONCLUSION

The Ninth Circuit has jurisdiction over this interlocutory appeal pursuant to the collateral order doctrine. The Ninth Circuit ignored significant legislative history as

well as the plain language of the McCarran-Ferguson Act in dismissing Pace's appeal for lack of jurisdiction.

Pace requests that this Court grant his Petition, reverse the Ninth Circuit's dismissal of his appeal, and remand the case to the Ninth Circuit for a determination on the merits. Without the safeguards of the interlocutory appeal process, both states and the insurance industry are significantly harmed by any prosecution brought in violation of the McCarran-Ferguson Act. The intent of the McCarran-Ferguson Act is to protect states and the insurance industry from the uncertainty that federal interference brings into the insurance realm. To that end, the McCarran-Ferguson Act prevents the federal government from exercising jurisdiction over state insurance matters. Furthermore, the McCarran-Ferguson Act creates a "right not to be tried" analogous to the double jeopardy clause. These compelling reasons dictate that the Ninth Circuit has jurisdiction over this interlocutory appeal pursuant to the collateral order doctrine.

Dated June ____, 2000.

KARP, HEURLIN & WEISS, P.C.

/s/_____

By: Bruce R. Heurlin
J. Michael Van Alsburg
Attorneys for Don H. Pace
3060 North Swan Road
Tucson, Arizona 85712-1225
(520) 325-4200

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed February 7, 2000]

No. 98-10521

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)
v.	)
DON H. PACE, *Defendant-Appellant.*	)

December 7, 1999, Argued and Submitted, San Francisco, California

Appeal from the United States District Court for the District of Arizona, Frank R. Zapata, District Judge, Presiding

OPINION

BEFORE: **BROWNING, RYMER** and **KLEINFELD**, Circuit Judges.

Opinion by: KLEINFELD, Circuit Judge

The issue before us involves appellate jurisdiction over an interlocutory appeal in a criminal case. We dismiss the appeal for lack of jurisdiction.

Facts

The case arises out of the bonding business in the construction industry. In private construction, obligations to laborers and material men are secured by mechanics lien laws, giving them liens against the real estate they improved. But it is not practical to give people liens against military bases and highways, so generally in government construction, the mechanics lien laws do not apply. Instead, the Miller Act requires contractors on federal projects to purchase bonds securing the laborers and material men. States generally have "little Miller Acts" doing the same thing for state and local construction.

Don H. Pace, the appellant, was in the business of selling these bonds. He has been indicted but not convicted for alleged personal dishonesty in this business. The facts we set out are based on the charges in the indictment, and have not been proved. Pace was the president and chief executive officer of Pace American Group, a corporation that owned American Bonding Company. Pace developed a business relationship with an agent who placed the kind of bonds Pace sold, Ralph Eidem, Jr. Eidem owned and operated Commercial Surety Bond & Insurance Agency. They made an arrangement for Eidem's agency to overcharge Pace's company, and then refund half the overcharge to Pace personally. Eidem kept the other half of the 5% overcharge.

This might have been innocent, had Pace's company been paying a bonus to Eidem's agency for placing so much business, and Eidem's agency refunding part of the bonus to Pace's company because it turned out to be so much money. But Pace's company knew nothing about it, and the 2-1/2% Eidem paid back went into Pace's personal pocket, not to his company. That 2-1/2% was around a half million dollars. It was disguised by false 1099's issued at Eidem's direction. Again, we are telling the government's story, which has not been proved and which the jury may ultimately reject.

Eidem and Pace were indicted for conspiracy to commit mail fraud, wire fraud, money laundering, and false tax returns. The case comes before us on Pace's appeal from denial of his motion to dismiss the indictment. The district court denied the motion, but stayed the case pending appeal, and certified the case for interlocutory appeal.

Analysis

Pace's theory was that California state law allowed the commission arrangement he had with Eidem, federal law leaves regulation of insurance to the states, and federal law precludes prosecution because prosecution would impair operation of California insurance law. We review *de novo.*[1]

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[1] *See, e.g., United States v. Fitzgerald*, 147 F. 3d 1101, 1102 (9th Cir. 1998).

1. 1292(b) Certification.

Under 28 U.S.C. § 1291, the federal court of appeals has jurisdiction over "final decisions of the district courts of the United States."[2] "A district court's decision is appealable under § 1291 only when the decision 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"[3] In a criminal case, litigation is not ended, and therefore not subject to "appellate review until conviction and imposition of sentence."[4] Thus on its face section 1291 does not give us jurisdiction over this appeal, because Pace has not yet been tried and convicted.

After it denied Pace's motion to dismiss and he filed his interlocutory appeal, the district court granted Pace's motion to stay the trial until we ruled on Pace's appeal. The district court was "of the opinion that its Order . . . denying Defendants' 'Joint Motion to Dismiss . . .' involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate

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[2] 28 U.S.C. § 1291 (1994).

[3] *Confederated Salish v. Simonich*, 29 F. 3d 1398, 1401 (9th Cir. 1994) (quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275, 99 L.Ed 2d 296, 108 S.Ct. 1133 (1988)).

[4] *Flanagan v. United States*, 465 U.S. 259, 263, 79 L.Ed. 2d 288, 104 S.Ct. 1051 (1984); *see also United States v. Carnes*, 618 F.2d 68, 69 (9th Cir. 1980).

termination of the litigation, and thus, is appropriate pursuant to 28 U.S.C § 1292(b)."

Pace argues that we have jurisdiction under section 1292(b) because of the district court certification. The argument is mistaken. Section 1292(b) does indeed provide for interlocutory appeals in certain circumstances upon a certification by the district court such as the one made here. But the statute is limited by the words "in a civil action."[5] This is not a civil action. It is a criminal prosecution. Because of the statutory qualification, section 1292(b) certifications cannot confer interlocutory appellate jurisdiction in criminal prosecutions. The section 1292(b) certification therefore cannot confer jurisdiction upon us.[6] Pace argues that efficiency and economy would be promoted by interlocutory appeal, but that is not an argument upon which we may act in light of the clear statutory limitation.

2. Collateral order.

Pace argues we have jurisdiction over his appeal under the collateral order doctrine. Under that collateral order doctrine, a small class of decisions are appealable under § 1291 even though they do not terminate the underlying action. "We have jurisdiction to hear an appeal of a district court's interlocutory order if the order (1) 'conclusively determines the disputed question'; (2) 'resolves an important issue completely separate from the merits of the action'; and

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[5] *See* 28 U.S.C. § 1292(b).

[6] *See United States v. Russell*, 804 F.2d 571, 573 n.3 (9th Cir. 1986).

(3) is 'effectively unreviewable on appeal from a final judgment.'" [7]

We need not consider the first two elements because Pace's theory for dismissal is reviewable on appeal from a final judgment, if he is convicted. He would simply argue then, as he does now, that the McCarran-Ferguson Act[8] protects him from the federal conviction.

Pace argues that that would not suffice, because his right under the McCarran-Ferguson Act is not merely to avoid a conviction, but to avoid prosecution and trial. If Pace is entitled not to be tried, then, as he says, vacating a conviction after a trial would not vindicate his right. He draws an analogy to double jeopardy cases, where interlocutory review must be provided[9] where otherwise a person might be "twice put in jeopardy."[10] The critical word in that constitutional language, for purposes of deciding whether interlocutory appeal is available, is "jeopardy"; the Constitution says "twice put in jeopardy," not "twice convicted." By analogy, Pace argues, the McCarran-Ferguson Act gives people in the insurance business an immunity from federal prosecution.

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[7] *Confederated Salish*, 29 F.3d at 1402 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 57 L.Ed.2d 351, 98 S.Ct. 2454 (1978)).

[8] 15 U.S.C. § 1012.

[9] *See Abney v. United States,* 431 U.S. 651, 661, 52 L.Ed.2d 651, 97 S.Ct. 2034 (1977).

[10] U.S. Const. amend. V.

We reject this argument. The McCarran-Ferguson Act does not provide an immunity from prosecution, regardless of whether in some circumstances it may provide a bar to conviction.

The statutory language cannot carry Pace's load. The McCarran-Ferguson Act says "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance. . . ."[11] Pace's state law argument is that California formerly prohibited insurance sellers from splitting commissions, but the prohibition was repealed.[12] His theory is that because California allows splitting of agents' commissions, construing the mail fraud and other federal statutes to prohibit what he did would impair operation of the state regulatory scheme. The government argues that the McCarran-Ferguson Act is expressly limited to state laws regulating the "business of insurance," and the secrecy and diversion of the money from Pace's company to Pace's pocket made this business of Pace personally, not his company's "business of insurance." The National Association of Insurance Commissioners, as *amicus curiae,* argue that the kind of secret kickback Pace is charged with taking is not the kind of commission splitting California decided to allow, so prosecution is not barred by the McCarran-Ferguson Act because it does not frustrate any state regulatory policy. We do not reach these arguments, because regardless of whether they are correct, the McCarran-Ferguson Act does not

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[11] 15 U.S.C § 1012(b).

[12] *See* Cal. Ins. Code § 755, *repealed by* Proposition 103, November 8, 1988.

provide an immunity from prosecution. Review of the issues raised by these arguments is available after a final judgment.

There is no language in the statute providing individuals with an immunity from prosecution. The statutory command is that no federal statute "shall be construed"[13] in a particular way, not that no one shall be prosecuted. Appellate courts construe statutes, so the command is addressed to us, but Congress has commanded us to construe them in federal criminal cases, with certain exceptions not applicable here, only after final judgment. We simply lack authority to construe the McCarran-Ferguson Act as applied to the substantive conduct at issue in this case until there is a final judgment. The statutory command tells us how to construe the statute, not when to construe it.

The only other circuit to have considered this issue is the Eleventh. It reached the same conclusion as we do, that the McCarran-Ferguson Act did not provide immunity from prosecution, no right "not to be tried," but rather acted "as a defense to liability" and was therefore effectively reviewable on appeal from final judgment.[14] There is no good reason to set up an intercircuit split on the issue.

Conclusion

No interlocutory review is available, despite the 1292(b) certification, and despite the collateral order doctrine

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[13] 15 U.S.C. § 1012(b).

[14] *Jordan v. Avco Fin. Servs.*, 117 F.3d 1254, 1258 (11th Cir. 1997).

and the McCarran-Ferguson Act. This appeal is therefore DISMISSED for lack of jurisdiction.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

[Filed December 29, 1998]

No. CR 97-208 TUC FRZ

UNITED STATES OF AMERICA,)
Plaintiff,)
)
v.)
)
DON H. PACE and)
RALPH EIDEM,)
Defendants.)
)

ORDER

Pending before the Court are Defendant Ralph Eidem's Motion to Continue Trial Date and Request for Status Conference, which Defendant states is "made as a result of the hearing on December 21, 1998 and the uncertainty of the status of the case resulting from the appeal filed by defendant Pace." Defendant Eidem's request further states that "[b]ecause of the press of other matters and in order to schedule subpoenas for witnesses, etc. the parties need to know whether the matter will be proceeding to trial on February 9, 1999, as currently scheduled."

On December 23, 1998, the Court issued its Order, granting a stay of proceedings pursuant to Defendant "Pace's Notice of Stay; Motion to Continue and Joinder in Ralph Eidem's Motion to Continue Trial Date; Motion to Proceed with Pretrial Proceedings." The Court's Order stated that the Court is of the opinion that its Order of November 24, 1998, denying Defendants' "Joint Motion to Dismiss Counts 1 to 76 Pursuant to 15 U.S.C. § 1012 (The McCarran-Ferguson Act)" involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation, and thus, is appropriate pursuant to 28 U.S.C. § 1292(b).

Though Defendant Eidem did not file a notice of interlocutory appeal, in view of the foregoing and the fact that Defendant Pace's interlocutory appeal is taken from this Court's denial Defendants' "Joint Motion to Dismiss Counts 1 to 76 Pursuant to 15 U.S.C. § 1012 (The McCarran-Ferguson Act)," the Court finds that Defendant Eidem's "Motion to Continue Trial Date," filed December 21, 1998, is moot in light of the stay of proceedings. Accordingly,

IT IS HEREBY ORDERED, in view of this Court's Order granting a stay of proceedings, pending the interlocutory appeal filed by Defendant Pace from the denial of the Defendants' "Joint Motion to Dismiss Counts 1 to 76 Pursuant to 15 U.S.C. § 1012 (The McCarran-Ferguson Act)," that Defendant Eidem's "Request for Status Conference" and "Motion to Continue Trial Date" are **DENIED** as moot.

IT IS FURTHER ORDERED that a Status Conference to set dates for all procedures, including a trial date, will be held forthwith upon a determination and mandate from the Ninth Circuit. The Court finds that any delay resulting from the interlocutory appeal is excludable under the Speedy Trial Act, 18 U.S.C. § 3161(h)(1)(E).

DATED this 29th day of December, 1998.

/s/_____
FRANK R. ZAPATA
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

[Filed December 23, 1998]

No. CR 97-208 TUC FRZ

UNITED STATES OF AMERICA, *Plaintiff,*

v.

DON H. PACE and RALPH EIDEM, *Defendants.*

ORDER

I

Introduction

On November 24, 1998, after extensive argument and briefing, this Court issued its Order denying the "Joint Motion to Dismiss Counts 1 to 76 Pursuant to 15 U.S.C. § 1012 (The McCarran-Ferguson Act)" filed by Defendants Don H. Pace and Ralph Eidem. Defendants argued that the McCarran-Ferguson Act mandates state law to take precedence over federal law by "inversely preempting"

federal law which interferes with state insurance regulation, thereby barring the prosecution of this case.

On December 3, 1998, Defendant Pace filed a Notice of Interlocutory Appeal, appealing the Court's Order denying said joint motion to dismiss. The Court of Appeals for the Ninth Circuit issued its Order for Time Schedule December 8, 1998.

Before the Court for consideration is Defendant "Pace's Notice of Stay; Motion to Continue and Joinder in Ralph Eidem's Motion to Continue Trial Date; Motion to Proceed with Pretrial Proceedings."

Also filed and before the Court for consideration is the "Government's Request that Court Issue Written Finding that Pace's Claim is Nonappealable and/or His Appeal is Frivolous, So the Court May Retain Jurisdiction to Proceed."

II.

Discussion

Defendant Pace urges that the proceedings in this Court are stayed pending the interlocutory appeal of the Defendants' joint motion to dismiss pursuant to the McCarran-Ferguson Act. Defendant Pace further moves to continue and join in Defendant Eidem's Motion to Continue Trial Date and states his willingness to proceed, without waiving any right to a stay of proceedings, with pretrial proceedings.

The Government, relying on *United States v. Garner,* 663 F.2d 834, 838 (9th Cir. 1981), in addition to Ninth Circuit precedent regarding the jurisdictional significance of filing of a notice of appeal, asserts that Defendant Pace cannot demonstrate that this Court's Order denying Defendants' joint motion to dismiss pursuant to the McCarran-Ferguson Act is a final and appealable order under 28 U.S.C. § 1291, and argues conversely, that "[a]n appeal from a pretrial order denying a motion to dismiss an indictment is typically considered interlocutory, and, therefore, not appealable as a final decision under 28 U.S.C. § 1291." *United States v. Chick,* 61 F.3d 682 (9th Cir. 1995).

Citing *Jordan v. AVCO Financial Services of Georgia, Inc.*, 117 F.3d 1254 (11th Cir. 1997), the Government asserts that Defendants' motion to dismiss based on the McCarran-Ferguson Act is "effectively reviewable on appeal from final judgment," and thus, Defendant Pace is not entitled to interlocutory appeal of the Court's November 24, 1998 Order. Further citing *United States v. Laughing,* 855 F.2d 659 (9th Cir. 1988), the Government argues that Defendant Pace's motion "is more akin to a motion to dismiss for lack of jurisdiction, an issue which is effectively reviewable after conviction."

The Government argues additionally, that even if Defendant Pace has the right to an interlocutory appeal, this Court nevertheless retains jurisdiction because Defendant Pace's appeal is frivolous.

Defendant Pace contends that the issue of immunity under the McCarran-Ferguson Act is analogous to the double jeopardy context set forth in *Abney v. United States,* 431 U.S.

651, 659-60, 97 S.Cft. 2034, 2040-41 (1977), and correctly asserts, citing *United States v. Claiborne,* 727 F.2d 842, 850 (9th Cir.) *cert. denied,* 469 U.S. 829, 105 S.Ct. 113 (1984) and *United States v. LaMere,* 951 F.2d 1106, 1108 (9th Cir. 1991), that the Ninth Circuit has held that *Abney*-type appeals generally divest the district court of jurisdiction to proceed with the case. Defendant acknowledges that an exception to the divestiture rule is established if a motion is found to be frivolous. *LaMere,* 951 F.2d at 1108. As the Court of Appeals explained:

> The divestiture rule takes on added significance when applied to interlocutory Abney-type criminal appeals since two important countervailing policies are at work. On the one hand, a defendant raising a meritorious Abney-type claim – asserting a valid constitutional "right not to be tried" – would be irreparably harmed if the trial court continued to proceed to trial prior to the disposition of the appeal. On the other hand, under an automatic divestiture rule, a defendant raising a meritless Abney-type could significantly delay and disrupt criminal trial court proceedings.

Because the matter before the Court is criminal, and the Government primarily relies on civil case law, the need to balance the interests set forth in *LaMere* is distinguished from and outweighs the reasoning under the collateral order doctrine set forth in *Jordan,* upon which the Government relies, limiting the appealability of interlocutory orders to those "that (1) conclusively determine (2) important legal

questions which are (3) completely separate from the merits of the underlying action and are (4) effectively unreviewable on appeal from a final judgment." 117 F.3d at 1256 *(citing Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-26 (1949).

This Court acknowledges that the divestiture of trial court jurisdiction is not absolute, but "is clearly applicable in a case where the defendant claims a right not to be tried at all," *United States v. Powell,* 24 F.3d 28, 31 (9th Cir. 1994), and "must be upheld prior to trial if it is to be enjoyed at all." Id. *(quotation omitted)*.

While the Government, relying in part on the analysis of the Court's Order, argues that Defendants' conduct did not constitute "the business of insurance," and thereby preclude the application of the McCarran-Ferguson Act, the Court does not find that Defendant Pace's appeal is "transparently frivolous,"[1] and is of the opinion that an interlocutory appeal divests this Court of jurisdiction.

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[1] *United States of America v. Brooks*, 145 F.3d 446, 44* (1st Cir. 1998) (as a general rule, the filing of a notice of appeal divests a district court of authority to proceed with respect to any matter touching upon, or involved in, the appeal, but there are exceptions, such as where notice of appeal is defective in some substantial and easily discernable way, or if it otherwise constitutes a transparently frivolous attempt to impeded the progress of the case).

III.

Conclusion

The Court finds that, while the Government correctly characterizes the Court's denial of Defendants' motion to dismiss pursuant to the McCarran-Ferguson Act as a non-appealable order for purposes of meeting the finality requirement of 28 U.S.C. § 1291, the issue of appealability is one to be presented and determined by the Court of Appeals for the Ninth Circuit, in view of an appeal having been taken and an Order for Time Schedule having been issued by the Ninth Circuit.

This Court is of the opinion that its Order of November 24, 1998, denying Defendants' "Joint Motion to Dismiss Counts 1 to 76 Pursuant to 15 U.S.C. § 1012 (The McCarran-Ferguson Act)" involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation, and thus, is appropriate pursuant to 28 U.S.C. § 1292(b). Accordingly,

IT IS HEREBY ORDERED that, pursuant to "Pace's Notice of State; Motion to Continue and Joinder in Ralph Eidem's Motion to Continue Trial Date; Motion to Proceed with Pretrial Proceedings" a stay of proceedings is **GRANTED**;

IT IS FURTHER ORDERED that the "Government's Request that Court Issue Written Finding that Pace's Claim is

Nonappealable and/or His Appeal is Frivolous, So the Court May Retain Jurisdiction to Proceed" is **DENIED**.

DATED this 23rd day of December, 1998.

/s/_____
FRANK R. ZAPATA
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed November 25, 1998]

No. CR 97-208 TUC FRZ

UNITED STATES OF AMERICA,
Plaintiff,

v.

DON H. PACE and RALPH EIDEM,
Defendants.

ORDER

Pending before the Court is Defendants' "Joint Motion to Dismiss Counts 1 to 76 Pursuant to 15 U.S.C. § 1012 (The McCarran-Ferguson Act)."

Defendants Don H. Pace and Ralph Eidem assert that the Government attempts to make illegal, under the federal mail fraud statute, acts that are "unquestionably" legal under the insurance laws of California and Arizona. Defendants argue that the McCarran-Ferguson Act, which mandates state

law to take precedence over federal law by "inversely preempting" federal law which interferes with state insurance regulation, bars the prosecution of this case.

The McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, enacted by Congress, in part, to allow states to regulate the business of insurance free from inadvertent preemption by federal statutes of general applicability that do not specifically apply to the business of insurance, provides in relevant part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012(b); *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1479 (9thCir.) *cert. denied,* 118 S.Ct. 559 (1997), *and cert. granted,* 118 S.Ct. 2339 (1998) (*citing Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1488-89 (9th Cir.), *cert. denied,* 516 U.S. 964, 116 S.Ct. 418 (1995)) (emphasis added).

The Ninth Circuit has adopted a four-part test to determine whether the McCarran-Ferguson Act precludes preemption of a state insurance law by a federal statute. Preemption is precluded under the Act if "(1) the statute does not 'specifically relate' to the business of insurance, (2) the acts challenged under the statute constitute the business of insurance, (3) the state has enacted a law or laws regulating the challenged acts, and (4) the state law would be superseded, impaired or invalidated by the application of the

federal statute." *Forsyth,* 114 F.3d at 1479 *(quoting Merchants Home,* 50 F.3d at 1489). "All four factors must be satisfied." *Id.*

It is undisputed that the mail fraud statute, 18 U.S.C. § 1341, *et seq.*, does not specifically relate to the business of insurance, and thus, the first factor is satisfied.

With regard to the second factor, at issue is whether that acts challenged under the statute constitute the business of insurance.[1]

Defendants argue that the acts at issue in Counts 1 to 76 of the Superseding Indictment, specifically the override commission paid to Commercial Surety Bond & Insurance Agency ("CSBA"), owned, operated and controlled by Defendant Eidem, from American Bonding Company ("ABC"), of which Defendant Pace was vice president and on the board of directors,[2] and the commission sharing from ABC to Pace,[3] are provided for under California insurance law, and thus, constitute the business of insurance.

While the 5% override to CSBA from ABC is not, *per se*, in and of itself challenged, it is alleged to be an integral

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[1] The Court notes that the majority of cases addressing the McCarran-Ferguson Act regard civil matters, though not exclusively. No distinctions, however, are made between the applicability of the factors to a criminal or civil case.

[2] Counts 2-22.

[3] Counts 23-43.

part of the alleged "scheme" in which Pace and Eidem agreed to the 5% provisional override with the understanding that Eidem would then, in turn, return 2.5% of the override to Pace, which Defendants claim is legitimate commission sharing under California law.

In their second supplement to their motion to dismiss, Defendants refer to the following language in the Superseding Indictment to show that Eidem shared his override commission with Pace in return for an exclusive insurance agency in a certain area, which Defendants offer in support of their argument that the challenged acts pertain to the business of insurance.

> It was further part of said scheme and artifice to defraud that the defendant Eidem, through CSBA, would gain the exclusive rights to sell insurance on behalf of American Bonding Company in certain territories, or in the alternative, receive a 5% commission (override) on any other business written within his territory on behalf of American Bonding Company, which would also be split with defendant Pace.[4]

Defendants assert that the Superseding Indictment concedes that the override and the sharing of the override were part of the business of insurance. The Government contests this assertion.

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[4] Superseding Indictment, page 5, ¶ 4.

The Supreme Court enunciated a three-part test, adopted by the Ninth Circuit, to determine whether the challenged activities constitute the business of insurance for purposes of preclusion under the McCarran-Ferguson Act.

> [F]irst, whether the practice has the effect of transferring or spreading a policy holder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.

Cisneros v. UNUM Life Insurance Co., 134 F.3d 939, 945 (9th Cir. 1998) (quoting *Metropolitan Life Insuranse Co., v. Massachusetts*, 471 U.S. 724, 740-43, 105 S.Ct. 2380, 2389-91 (1985) (in turn *quoting Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 129, 102 S.Ct. 3002, 3008-09 (1982)).

The three McCarron-Ferguson *(Pireno)* factors to determine whether the alleged acts constitute the business of insurance "are simply relevant considerations or guideposts, not separate essential elements of a three-part test that must each be satisfied for a law to escape preemption." *Washington Physicians Service Association v. Gregoire*, 147 F.3d 1039, 1047 (9th Cir. 1998) (*quoting Cisneros*, 134 F.3d at 946.

At the time of hearing, Defendants asserted that under California and Arizona law, there are no restrictions on sharing a commission. Defendants specifically asserted that "it is clear . . . sharing a commission with *whoever under whatever circumstances* is specifically part of the business of

insurance and it is proved beyond a reasonable doubt because the state through the insurance statutes specifically address it." (emphasis added)[5]

This assertion alone appears to indicate that the challenged acts, specifically the 2.5% commission sharing, as alleged in Counts 23 through 43, do not fall within the business of insurance and defeats Defendants' premise that the practice of sharing the commission "has the effect of transferring or spreading the policyholders' risks . . . is an integral part of the policy relationship between the insurer and the insured, and . . . is limited to entities within the insurance industry."

Accordingly, the second factor to preclude preemption under the savings clause test, which requires that "the acts challenged under the statute constitute the business of insurance," is not satisfied.

Because all four factors must be met, there is no need for further analysis; however, even if the Court were to address the third and fourth factors, it does not appear that the California or Arizona law referred to specifically address the challenged acts or would be "superseded, impaired or invalidated" by application of the statutory violations alleged in the superseding indictment.

Therefore, the McCarran-Ferguson Act does not preclude the prosecution of the acts alleged as Defendants contend.

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[5] Transcript of July 29, 1998 Hearing, page 42.

Based on the foregoing,

IT IS HEREBY ORDERED that Defendants' "Joint Motion to Dismiss Counts 1 to 76 Pursuant to 15 U.S.C. § 1012 (The McCarran-Ferguson Act)" is **DENIED**.

DATED this 24th day of November, 1998

/s/_____
FRANK R. ZAPATA
United States District Judge

APPENDIX E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed March 22, 2000]

No. 98-10521

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)
v.	)
DON H. PACE, *Defendant-Appellant.*	)

ORDER

BEFORE: BROWNING, RYMER, and KLEINFELD, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a

vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and petition for rehearing en banc are DENIED.

APPENDIX F

15 USCS §§ 1012

TITLE 15. COMMERCE AND TRADE
CHAPTER 20. REGULATION OF INSURANCE

15 USCS § 1012 (2000)

§§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act [15 USCS §§§§ 1 et seq.], and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 USCS §§§§ 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Amendments:
1947. Act July 25, 1947, in subsec. (b), substituted "June 30, 1948" for "January 1, 1948.".

* * * * *

INSURANCE - REGULATION AND TAXATION BY STATES

HOUSE COMMITTEE ON THE JUDICIARY

House Report No. 143, February 13, 1945

THE Committee on the Judiciary, to whom was referred the bill (S. 340) to express the intent of the Congress with reference to the regulatlon of the business of insurance, having considered the same report favorably thereon with an amendment with the recommendation that the bill, as amended, do pass.

GENERAL STATEMENT

From its beginning the business of insurance has been regarded as a local matter, to be subject to and regulated by the laws of the several States. This view has been fostered and augmented by decisions of the United States Supreme Court for a period of more than 75 years, leading to the generally accepted doctrine that the business of insurance was not subject to Federal Law.

On June 5, 1944, in the case of *U. S. v. Southeastern Underwriters Association et al.*, the Supreme Court decided that the business of insurance was commerce and, therefore,

subject to the Sherman Act of July 2, 1890, as amended, and the Clayton Act of October 15, 1914, as amended.

The Attorney General, in several appearances before the Judiciary Committee, frankly stated that the Department of Justice had no opposition to an extension of time to the insurance industry in order to make necessary adjustments to this decision.

Inevitable uncertainties which followed the handing down of the decision in the *Southeastern Underwriters Association* case, with respect to the constitutionality of State laws, have raised questions in the minds of insurance executives, State insurance officials, and others as to the validity of State tax laws as well as State regulatory provisions: thus making desirable legislation by the Congress to stabilize the general situation.

Bills attempting to deal with the problem were considered in both the House and the Senate during the Seventy-eighth Congress, but failed of enactment. Your committee believes there is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective States. Already many insurance companies have refused, while others have threatened refusal to comply with State tax laws, as well as with other State regulations, on the ground that to do so, when such laws may subsequently be held unconstitutional in keeping with the precedent-smashing decision in the *Southeastern Underwriters* case, will subject insurance executives to both civil and criminal actions for misappropriation of company funds.

The committee has therefore given immediate consideration to S. 340, together with a similar measure, H.R. 1973, so that the several States may know that the Congress desires to protect the continued regulation and taxation of the business of insurance by the several States, and thus enables insurance companies to comply with State laws. What is more, the Congress proposes by this bill to secure adequate regulation and control of the insurance business.

Nothing in this bill is to be so construed as indicating it to be the intent or desire of Congress to require or encourage the several States to enact legislation that would make it compulsory for any insurance company to become a member of rating bureaus or charge uniform rates. It is the opinion of Congress that competitive rates on a sound financial basis are in the public interest.

It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer v. Louisiana* (165 U. S. 578), *St. Louis Cotton Compress Co. v. Arkansas* (260 U.S. 346), and *Connecticut General Insurance Co. v. Johnson* (303 U.S. 77), which hold, *inter alia*; that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals

or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way.

PURPOSE OF THE BILL

The purpose of the bill is twofold: (1) To declare that the continued regulation and taxation by the several States of the business of insurance is in the public interest; and (2) to assure a more adequate regulation of this business in the States by suspending the application of the Sherman and Clayton Acts for approximately two sessions of the State legislatures, so that the States and the Congress may consider legislation during that period. It should be noted that this bill, by the moratorium proposed therein, does not repeal the Sherman and Clayton Acts, but opportunity will have been granted for the States to permit agreements and contracts by insurance companies which otherwise might be in violation of the Sherman and Clayton Acts. It should be noted further that no moratorium is granted from the Sherman Act relative to agreements or acts of boycott, coercion, or intimidation.

ANALYSIS BY SECTION

Section I declares that the continued regulation and taxation by the States of the business of insurance is in the public interest.

Section 2 provides that the insurance business, and all persons engaged in such business, shall be subject to State laws relating to the regulation and taxation of such business: and (b) that no act of Congress shall be construed to invalidate, impair, or supersede any State law which regulates

or taxes the insurance business, unless such act specifically so provides.

Section 3 provides that the Federal Trade Commission Act and the Robinson-Patman Antidiscrimination Act shall not apply to the insurance business, or to acts in the conduct of such business.

Section 4 suspends the application of the Sherman Act and the Clayton Act to the business of insurance until January 1, 1948; and (b) provides that at no time are the prohibitions in the Sherman Act against any act of boycott, coercion, or intimidation suspended. These provisions of the Sherman Act remain in full force end effect.

Section 5 provides that the enactment of this act shall not effect, in any manner, the present application of the National Labor Relations Act, the Fair Labor Standards Act, or the Merchant Marine Act, to the business of insurance.

Section 6 defines the term "State."

Section 7 provides for separability of provisions.

CONCLUSION

In the considered judgment of your committee, S. 340, as amended, represents a most commendable effort on the part of insurance companies and State insurance commissioners to effect the adjustments and reorganization in and among the financial operations of insurance companies and in State laws which have been made necessary by the decision in the *Southeastern Underwriters* case. It should be emphasized that

the bill has received the overwhelming endorsement of the principal national organizations of State insurance commissioners, insurance executives, agents, brokers, and underwriters, including the National Association of Insurance Commissioners, the American Life Convention, the American Mutual Alliance, the Association of Casualty and Surety Executives, the Inland Marine Underwriters Association, the National Association of Insurance Agents, the National Association of Mutual Insurance Agents, the National Board of Fire Underwriters, Insurance Executives Association, National Association of Insurance Brokers, Inc., the National Association of Casualty and Surety Agents, the Surety Association of America, the National Fraternal Congress of America, and the Health and Accident Underwriters Conference. Opportunity is granted to the State legislatures during their present and forthcoming sessions for 1945, 1946, and 1947 to consider the welfare of policyholders.

Enactment of this bill will (1) remove existing doubts as to the right of the States to regulate and tax the business of insurance, and (2) to secure more adequate regulation of such business.

* * * * *